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ABSTRACT

This chapter reviews court decisions in education during 1986 that addressed issues related to student rights and the jurisdiction of schools with respect to pupils. The first section of the review covers the issues of public school assignment, tuition, transportation, and compulsory attendance. This is followed by short discussions of cases arising from bilingual and bicultural programs, and those having to do with private and parochial schools. Attempts by school districts to control the use and sale of drugs by students have led to a sharp increase in cases reported in the sections of this chapter discussing the substantive rights of students in search and seizure cases and sanctions for student misconduct. Also discussed are cases that interpret First Amendment rights with respect to religion and free expression, cases arising from corporal punishment, and legal challenges to student testing and placement. The final section addresses school desegregation decisions and issues, including systemwide remedies, cross-district remedies, oversight of desegregation plans, state court cases, and liability for attorney's fees. (TE)

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INTRODUCTION

Attempts by school districts to control the use and sale of drugs by students have led to a sharp increase in cases reported in two sections of this chapter. Search and seizure issues are sometimes raised when school disciplinary proceedings or criminal charges are filed against students found with drugs. Courts continue to apply the standard of reasonable suspicion in school drug searches, and most such searches were upheld in 1986. Several state courts, however, addressed the question of whether searches that might pass federal constitutional muster could be challenged under state search standards.

Drug-related cases also are found in the section on suspensions and

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expulsions. As a means of dealing with increased drug use by students, some schools have adopted automatic expulsion penalties for the use or sale of controlled substances. These measures were attacked on both procedural and substantive due process grounds in a number of 1986 cases. While the penalties generally were upheld, courts questioned the power of school officials to regulate student conduct off school premises. Several out-of-school drug cases resulted from testimony provided by undercover informants, whose role also led to challenges in several cases.

First amendment religion and expression also continued to be areas of high activity. Home instruction remained a source of court challenges, advanced on religious and other constitutional grounds. The debate also continued in the courts regarding the use of school facilities by student religious groups during activity periods. The greatest number of free expression cases, however, continue to argue questions of school access raised by organizations seeking to convey social or political messages.

Finally, desegregation cases still occupy the attention of federal courts, with a dozen such cases heard in 1986 by circuit courts of appeal. The standards to be used by district courts in reviewing desegregation in districts previously declared unitary were debated by two appeals courts, which issued conflicting opinions. The United States Supreme Court, however, refused to hear either case.

PUBLIC SCHOOL ASSIGNMENT, TUITION, AND TRANSPORTATION

Tuition and Assignment

Pupil tuition and assignment cases sometimes involve constitutional issues, such as the obligation of states to provide education to undocumented aliens or the creation of an irrebuttable presumption of nonresidence in a residency law. Major issues were lacking in 1986 cases, however, as more traditional disputes involving guardianship or domicile for educational purposes predominated.

A West Virginia student challenged the decision of a high school principal that prohibited him from enrolling in the district. Because of family problems, the student had left his parents' home and was staying with relatives who resided in a different school district. He was denied admittance to the local high school because he lacked innoculation and academic records and because the relatives with whom he was staying were not his legal guardians. The supreme court of appeals, however, concluded that the principal should have provisionally admitted

the student pending a resolution of the guardianship question.[1] The court found that West Virginia law contained the presumption that the public schools should be open to all persons of proper age. While guardianship questions were important, the statute did not require the child to remain in the previous district while they were resolved.

In another West Virginia decision, the state's high court ruled that a school district had acted arbitrarily and capriciously in refusing to admit a child into kindergarten whose birthday fell three days after the deadline for acceptance.[2] The court found that the school board had failed to exercise the discretion provided for under the relevant state statute for a child under the age of five shown to be "capable of kindergarten work." A dissenting justice argued that the failure to use a fixed date would produce a group of kindergarten graduates unable to enter first grade, because the statute sets an absolute date for that program.

Two New York school districts squabbled over whose duty it was to educate the children of a woman living in a temporary shelter for the homeless. Neither the district where the woman previously resided nor the district where the shelter was located would accept the children. A New York appeals court resolved the question by ordering the district with the shelter to provide the education, holding that a school district cannot deny enrollment to children living within the district even if their residence may only be for a foreseeable short term.[3]

A state of Washington statute permits students with a "special hardship" to be enrolled in districts other than the one in which they reside, under provisions including an administrative appeals system. Those who lose administrative decisions frequently provide litigation to be reported in this chapter. In a 1986 case, the Washington Supreme Court overturned a lower court decision granting a hardship transfer to parents who claimed "adverse safety and education conditions" in their home school district.[4] Neither this claim, nor the mother's suggestion that the stress caused by the situation had led her to suffer a digestive disorder, were sufficient to cause the court to find that the administrative denial of the transfer was so clearly erroneous that it required judicial reversal.

A New York appeals court upheld a lower court decision requiring parents to pay tuition for their children.[5] Both courts found that the parents had failed to offer any evidence that their official residence was a city apartment and not a farm that postal and tax records indicated was their residence of record.

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1. White v. Linkinoggor, 344 S.E.2d 633 (W. Va. 1986).
2. Blessing v. Mason County Bd. of Educ., 341 S.E.2d 407 (W. Va. 1985).
3. Delgado v. Freeport Pub. School Dist., 499 N.Y.S.2d 606 (Sup. Ct. 1986).
4. Frazier v. Superintendent of Pub. Instruction, 725 P.2d 619 (Wash. 1986).
5. Oneota City School Dist. v. Manning, 501 N.Y.S.2d 231 (App. Div. 1986).

In a North Dakota case, a local school district challenged an order by the county committee that it pay the tuition of children wishing to attend a public school in a different district. The school district based its claims on technical grounds, arguing that the county committee had failed to meet statutory requirements by allowing more than fifteen days to elapse between the date of the appeal and its decision. The state supreme court rejected their claim, concluding that the time limit in question was designed to assure "order and promptness" in the proceedings and that the "legislature did not intend that noncompliance would preclude action on applications filed under the statute."[6]

Transportation

A Pennsylvania school district and the state each sought a declaratory judgment on whether a district was obligated to provide midday transportation to gifted, nonpublic school students. The court found that a state statute requiring that gifted students in private schools be provided with an opportunity for "dual enrollment" in special public school programs contained an implicit obligation that they be transported.[7] It then ruled that public school districts were obliged to provide either free transportation or board and lodging to such students.

Each year this section reports at least one West Virginia rural road case and 1987 is no exception. The West Virginia Supreme Court of Appeals previously has held that the state constitution makes education a fundamental, constitutional right and that West Virginia children must be provided with transportation in order to exercise that right.[8] Parents of a child living on a two-mile dirt road brought suit against their school district and the state highway department, asking for transportation and improvement of the road so that the service could be provided. They subsequently appealed a lower court decision that failed to order the road repairs.

Testimony in the case revealed that the plaintiff's children and thirteen other elementary students faced numerous obstacles walking to school down Sand Creek Hollow Road, including several river crossings. After leaving the hollow, their walk to school then included a river crossing on an abandoned, swinging pedestrian bridge and a trip across railroad tracks containing moving or parked coal trains. After this review, the court concluded that the highway department had an obligation to fix the road sufficiently to allow a bus or a smaller school

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6. Stolen Pub. School Dist. v. Heisler, 381 N.W.2d 201, 204 (N.D. 1986).

7. Woodland Hills School Dist. v. Pennsylvania Dep't of Educ., 516 A.2d 875 (Pa. Commw. Ct. 1986).

8. *See* Pauley v. Kelly, 255 S.E.2d 859 (W. Va. 1979); Shrewsbury v. Board of Educ., 265 S.E.2d 767 (W. Va. 1980).

transport vehicle to provide transportation to the children.[9]

Compulsory Attendance

The popularity of home education, particularly among members of religious sects, continued to lead to conflicts with compulsory school attendance laws in 1986. Disputes frequently arise when parents or unaccredited small private schools fail to comply with state regulations regarding teacher certification or curriculum approval processes. Legal action often is initiated by local school officials who question a student's whereabouts during school hours or who suspect that the education being received by a child in a home school program is inadequate. While state home instruction statutes vary widely, courts have upheld state regulations so long as they do not involve subjective, case-by-case evaluations of home programs.

In a North Dakota case, several parents convicted of violating compulsory school attendance laws challenged that state's requirement that all students be taught by certified teachers, on the ground that their freedom of religion was being violated.[10] The parents in question were fundamentalist Christians who had chosen to educate their children at home in the belief "that God had given them sole responsibility to educate their children."[11] The North Dakota Supreme Court conceded that the compulsory school attendance statutes did impose some burden on the plaintiffs' free exercise right. Nevertheless, the court refused to overturn the conviction on the grounds that the certification requirement was one of the least intrusive means of ensuring that the state's children received an adequate education.

In a complicated case also reported here last year, the parents of children enrolled in a home school program sought declaratory, injunctive, and monetary relief against officials involved in the enforcement of Indiana's compulsory school attendance law. In deciding the issue, the Seventh Circuit Court of Appeals denied the plaintiffs' request and refused to decide the constitutional issues they raised on the grounds that such claims were moot.[12] The parents themselves had enrolled their children in an Illinois school. Despite the parents' claim that they had

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9. Collins v. Ritchie, 351 S.E.2d 416 (W. Va. 1986).

10. State v. Patzer, 382 N.W.2d 631 (N.D. 1986). In a case presenting the same facts, an equally divided Michigan Supreme Court upheld a state teacher certification requirement against parochial schools on the grounds that its infringement on free exercise rights was "minimal." *See* Sheridan Road Baptist Church v. Department of Educ., 396 N.W.2d 373 (Mich. 1986).

11. 382 N.W.2d 631, 633 (1986).

12. Mazanec v. North Judson-San Pierre School Corp., 798 F.2d 230 (7th Cir. 1986). *See* The Yearbook of School Law 1986 at 79.

placed them there out of fear of future prosecution for truancy violations, the court held that the move "fatally weakened" the parents' standing to challenge Indiana attendance law.

The parents also sought monetary damages on the grounds that the local superintendent of schools had initiated legal action against them out of hostility to home schooling and their beliefs as Jehovah's Witnesses. The appeals court also rejected those claims, finding that it was their own refusal to verify their compliance with state statutes, and not any misconduct by the superintendent, that had caused legal action to be taken against them. A request for an award of attorneys' fees was denied on the ground that they "never prevailed in getting any declaration that their civil rights claims had merit."[13]

The correct proceedings to use in addressing home instruction cases were argued before the North Dakota Supreme Court. The parents of several children had withdrawn them from the public schools and were educating them at home. The state then sought to have the children declared "unruly." The court ruled that "a child may not be found to be unruly because of habitual truancy if the child is absent from school in compliance with the directives of the parents."[14] The correct course of action, then, was to proceed against the parents for violating compulsory attendance laws.

New York statutes place a burden on parents to show that home instruction is "substantially equivalent" to that provided to children of like age and attainments in local public schools. Legal action was initiated against a Delaware County family because of their refusal to cooperate with attempts by officials to ascertain the quality of education being furnished to their children. A local family court had ruled in the parents' favor on the grounds that the burden of proof was on the state to prove educational neglect. An appeals court overturned this decision, finding that the parents' refusal to cooperate permitted an inference of neglect on their part.[15]

A Virginia appellate court considered the appeal of parents whose children were denied a religious exemption from compulsory school attendance by a local school board.[16] A lower court had ruled that the board did not abuse its discretion in the denial. The appeals court decided to dismiss the case on technical grounds, concluding that it did not have the jurisdiction to conduct a review of an administrative decision unless made by a state agency, thus leaving school board decisions of this sort outside its purview.

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13. *Id.* at 237.
14. *In re* C.S., 382 N.W.2d 381 (N.D. 1986).
15. *In re* Andrew TT, 504 N.Y.S.2d 326 (App. Div. 1986).
16. Schwartz v. Highland County School Bd., 346 S.E.2d 544 (Va. Ct. App. 1986).

In a case that did not involve home instruction, a Minnesota appeals court overturned a lower court decision finding three children guilty of habitual truancy.[17] The students challenged the admission of school attendance records as evidence in the case, making the novel argument that the use of the records would violate their right to confront and cross-examine witnesses. In order to prove the charges of habitual truancy against the students, it had to be shown that "they [had] absented themselves from school without lawful excuse."[18] The court concluded that school attendance records were inadmissible as evidence against the students because they did not just reflect nonattendance, but also contained judgments as to whether the students' absences were excused. The court held that the admission of such "evaluative" reports would violate the students' right to challenge the evidence used against them. This decision was appealed.

On appeal, the Supreme Court of Minnesota found that the evidence against two of the students was sufficient to prove habitual truancy, but was not enough for a third.[19] The court ruled that school attendance records were admissible to show the absence of a student on a particular day, the excuse that was offered by the parent, and the fact that no explanation for the absence was received from a parent or guardian. Looking at the details of the absences, the court found that the burden of proof was on the parent to provide lawful excuses for absences and, after examining the challenged attendance records, found sufficient evidence that such excuses were not present for two of the children.

A justice of the Supreme Court of South Carolina overturned the decision of a local family court judging a minor to be delinquent because she had twenty-one unexcused absences from school.[20] The court concluded that the days the student had been suspended from school should not have been counted and that there could be no finding of delinquency without evidence that her absences had occurred without the knowledge of her mother.

In another South Carolina case, a justice heard the appeal of a minor who also had been found guilty of violating that state's compulsory attendance laws.[21] The court ruled that the issues raised in the case were moot because the student had reached an age that the act in question did not cover and because the court order against him had expired without causing him any continuing disability.

A juvenile who was detained by police officers for being truant and

17. *In re* L.Z., 380 N.W.2d 898 (Minn. Ct. App. 1986).
18. *Id.* at 903.
19. *In re* L.Z., 396 N.W.2d 214 (Minn. 1986).
20. *In re* Angela H., 340 S.E.2d 544 (S.C. 1986).
21. *Ex parte* Lathan J., 343 S.E.2d 179 (S.C. 1986).

who was subsequently arrested for assaulting a policewoman appealed a family court decision.[22] The student claimed that the enforcement power of the compulsory education laws was exclusively conferred on school officials. The appellate court rejected this claim, concluding that the officer who detained the appellant had the authority to do so even though compulsory attendance laws were noncriminal in nature.

BILINGUAL-BICULTURAL PROGRAMS

Mexican-American plaintiffs in Texas continued their litigation against the Raymondville Independent School District which they accused of discriminating against them in their ability grouping of students, their teacher hiring practices, and their failure to implement an adequate bilingual education program. The Fifth Circuit Court of Appeals decided in 1981 that the district's bilingual education program did not violate title VI of the 1964 Civil Rights Act.[23] The case was remanded, however, so that the district court could examine the plaintiffs' claims in light of possible past racial discrimination by the district.

On remand, the plaintiffs amended their complaint to include the Texas Education Agency, alleging that the state had failed to ensure that the local district had implemented an adequate bilingual program. After a second trial, the district court concluded that no vestiges of past discrimination remained. Therefore, the court held a second time that the district had violated neither title VI nor the Equal Educational Opportunities Act of 1974 and also found that the state had discharged its responsibilities under Texas law.

In its second review of this case, the Fifth Circuit Court employed the standard of whether the lower court's decision was "clearly erroneous" and found that the district court had not abused its discretion in finding for the defendants on all the points at issue.[24] The appeals court began by noting the "wide array" of changes made in the district's bilingual programs. The court then agreed that the existence of a high school in which nearly 98% of the student body was comprised of Mexican-Americans did not necessarily imply purposeful segregation because of the school district's large Hispanic population. The court further held that ability grouping practices of the district were not necessarily discriminatory, since the scores on tests written only in English were "but one factor" used in assigning students to one of three ability groups. The court also found that the district's low percentage of Mexican-American teachers stemmed

22. *In re* Shannon B., 503 N.Y.S.2d 179 (App. Div. 1986).

23. Castaneda v. Pickard, 648 F.2d 989 (5th Cir. 1981). *See* The Yearbook of School Law 1982 at 142.

24. Castaneda v. Pickard, 781 F.2d 456 (5th Cir. 1986).

from undesirable living and working conditions, as well as competition from other school districts. The appeals court concluded by observing that it was not its role to determine whether the district had taken every possible step to improve the education of its Spanish-speaking students.

The Chicago Board of Education was successful in obtaining a protective order from a district court preventing the federal government from taking depositions on the motives behind the board's activities in preparing its federal bilingual grant application.[25] The application is an issue in the ongoing Chicago school desegregation dispute, with questions raised as to whether the bilingual program materially aids the desegregation plan. The court held that the government could seek objective information from the district but that the examination of the board's motives or intent represented a "fishing expedition" that could be conducted only with "hard evidence" of the board's bad faith.

PRIVATE AND PAROCHIAL SCHOOLS

A 1983 Rhode Island parochial school case continued in 1986, with the school district involved in the dispute seeking attorneys' fees from the state commissioner of education. The district did not operate a high school but paid tuition for students to attend several nearby public schools. A parent sought tuition from the district for his son to attend a parochial school and the request was denied. The commissioner subsequently ordered the district to pay the tuition and litigation followed.

The issue was resolved by the Rhode Island Supreme Court where the question of state law interpretation had been certified as part of a federal court lawsuit. The state high court ruled that the commissioner had misinterpreted state law in ordering the school district to provide tuition for students to attend any school of their own choice.[26] The commissioner then appealed an award of attorneys' fees made by the federal district court where the litigation had started to the First Circuit Court of Appeals.[27]

The commissioner claimed that the fees should be denied because the case was decided under state court proceedings over which the district court had no control, claiming *Pennhurst State School and Hospital v. Haldeman*[28] as authority. The First Circuit Court rejected this defense, holding that *Pennhurst* encourages the certification of issues to

25. United States v. Board of Educ. of Chicago, 636 F. Supp. 1050 (N.D. Ill. 1986).
26. Exeter-West Greenwich Regional School Dist. v. Pontarelli, 460 A.2d 934 (R.I. 1983).
27. Exeter-West Greenwich Regional School Dist. v. Pontarelli, 788 F.2d 47 (1st Cir. 1986).
28. 465 U.S. 89 (1984).

state courts. The appeals court went on to find that the award was appropriate, even though the federal section 1983 claim was not finally decided by the federal court, thereby rejecting the second of the defendant's claims. Finally, the appeals court rejected an eleventh amendment defense and upheld the lower court order that the fees be paid.

SUBSTANTIVE RIGHTS OF STUDENTS

Search and Seizure

Search and seizure cases are reflecting the fact that school personnel are becoming more assertive in seeking to control student drug use and in preventing the sale of drugs in schools. The United States Supreme Court decision in *New Jersey v. T.L.O.*[29] helped clarify some school search issues. In that case, the Court held that searches were justified if there were "reasonable grounds" that the student was violating the law or school rules and that a search would pass muster when the methods adopted were "reasonably related to the objectives of the search and are not excessively intrusive in light of the age and sex of the student and the nature of the infraction."[30] The "reasonableness" balancing test enunciated in *T.L.O.* was at the heart of a number of 1986 search and seizure cases.

A New Jersey appeals court confronted the question of reasonableness in reviewing the requirement of a local school district that over 500 high school students receive an annual urine test to detect the presence of controlled substances.[31] Students with positive tests were referred to counseling and treatment programs. No civil or criminal penalties resulted and the test results were kept confidential. As described by the court, the "linchpin" of the district's argument was that the tests were medical in nature and that, therefore, the law of search and seizure did not apply. The plaintiffs disagreed, referring to the practice as "general searches of student plaintiffs' bodies under the subterfuge of forced medical examination."[32]

The court looked for guidance in other urine-testing cases, finding that tests had been approved when they were related to the demands of a particular occupation and were administered to those in selected positions.[33] In the case at hand, the testing of the students took place

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29. 469 U.S. 325 (1985).

30. *Id.* at 336.

31. Odenheim v. Carlstadt-East Rutherford Regional School Dist., 510 A.2d 709 (N.J. Super. Ct. Ch. Div. 1985).

32. *Id.* at 711.

33. Shoemaker v. Handel, 608 F. Supp. 1151 (D.N.J. 1985) (testing of jockeys); McDonell v. Hunter, 612 F. Supp. 1122 (S.D. Iowa 1985) (testing of a corrections officer).

without any suspicion at all that specific students had been using drugs. Thus the court found, echoing *T.L.O.*, that the search was "not reasonably related in scope" to the circumstances that justified the search. The court went on to observe that the spectrum of items a school might define as "medical" was "limitless," holding that the school had other less-intrusive methods for dealing with drug use.

A state of Washington appeals court found that a school had more than enough particularized suspicion about a student's involvement with drugs to make a locker search reasonable.[34] A search of the student's locker led to the discovery of a box containing hallucinogenic mushrooms that the student admitted he had been selling in school. After a court conviction, the student sought to have the evidence taken in the search excluded from consideration in his appeal. In considering this fourth amendment claim, the court turned to the issues that led to the search, including an informant's tip, three previous teacher reports of the student's drug use, conferences with the student's parent, and the student's presence in places where drugs were believed to be sold. This was more than enough to convince the court that the search was reasonable. The court also ruled that the Washington Constitution, otherwise more restrictive than the federal fourth amendment, was not more restrictive in the area of school searches.

A Florida student failed to convince a court that the evidence taken in a search of his locker should be suppressed.[35] The student was convicted for taking lunch tickets valued at more than $3,000 from a school office. The search of the sticky-fingered student was found to be reasonable after witnesses had seen him near the office in question and when he was found trying to conceal a jar of honey that also had been taken.

A Pennsylvania court confronted a question of first impression for that state's courts in deciding whether the fruits of a locker search could be used in a delinquency proceeding.[36] The student was seen taking cigarettes from his locker and giving them to another student. A subsequent search of the locker found more cigarettes and marijuana. Despite these parallels with *T.L.O.*, the court reached a different conclusion, holding that the student had a reasonable expectation of privacy in the locker and that the school had no suspicion that the student also was involved in drug use or sales. In a concurring opinion, two of the three justices further explained that the school had never told students that lockers might be searched, creating the expectation that they represented a zone of privacy similar to the student's person.

Strip searches of students frequently result in litigation. A Michigan

34. State v. Brooks, 718 P.2d 837 (Wash. Ct. App. 1986).
35. R.D.L. v. State, 499 So. 2d 31 (Fla. Dist. Ct. App. 1986).
36. *In re* Dumas, 515 A.2d 984 (Pa. Super. Ct. 1986).

district court considered requests for summary judgment in a case involving a strip search of a student found behaving suspiciously in a parking lot by a school security guard.[37] A search of the student's purse uncovered school "readmittance slips," but a body search resulted when the principal believed that the student was in possession of drugs. None were found. In looking at the facts, the court found that the principal lacked a reasonable suspicion that drugs would be found. Thus, under *T.L.O.*, the search was not reasonable at its inception, and the case against the principal was allowed to continue.

First Amendment Religious Rights

The use of school facilities by student-run religious groups during extracurricular activity periods was before the United States Supreme Court in 1986, but the Court sidestepped the constitutional issue. *Widmar v. Vincent*[38] established the principle that universities could not deny student prayer groups equal access to school facilities were that afforded other groups, without violating their free speech rights. The applicability of the decision to the public schools has remained in doubt. In a review of a case raising this issue, the Third Circuit Court of Appeals found that a secondary school prayer group fell outside the *Widmar* holding.[39] The appeals court suggested that secondary students were more impressionable than their university counterparts and might see state sponsorship in the practice. The court held that the public school prayer group activities would lead to the school's "excessive entanglement" with religion, thereby violating the first amendment.

When this case reached the Supreme Court, however, it was decided on a secondary issue. The student group, Petros, filed the original federal court action and won the ruling that their free speech rights had been abridged by the failure of the school district to allow their club to meet.[40] Appeal to the Third Circuit was taken, however, not by the board but by an individual board member, John Youngman, Jr. His standing to pursue the appeal did not become an issue until the case was heard by the Supreme Court. Once the issue was raised, the five-to-four Court majority held that he did not have standing and the appeal was dismissed.[41]

In dissent, the Chief Justice argued that Youngman's standing as a parent of a student in the district gave him the right to appeal and

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37. Cales v. Howell Pub. Schools, 635 F. Supp. 454 (E.D. Mich. 1985).
38. 454 U.S. 263 (1981).
39. Bender v. Williamsport Area School Dist., 741 F.2d 538 (3d Cir. 1984). *See* The Yearbook of School Law 1985 at 106-8.
40. Bender v. Williamsport Area School Dist., 563 F. Supp. 697 (M.D. Pa. 1983).
41. Bender v. Williamsport Area School Dist., 106 S. Ct. 1326 (1986).

observed that had the appeal been pursued on that basis it would have been before the Court in its same form. As to the issue raised in the Third Circuit, the Chief Justice concluded that the establishment clause was not controlling in the face of equal access claims advanced by the students. The four dissenting justices indicated that they felt *Widmar's* speech and association rights would properly be extended to high school students.

The extent to which schools create a "public forum" by allowing meetings to occur on their premises, opening up claims by religious groups for equal treatment, was argued in other 1986 cases. The Seventh Circuit Court of Appeals considered an appeal of a federal court decision in Indiana that had held that teachers did not have the right to hold prayer meetings in school before the contractual start of their school day.[42] The appeals court concluded that the teachers did not have a right of free access to the school for meetings on topics of their own choosing when the plaintiffs had not demonstrated a similar privilege had been conveyed to the general public.

The issue of before-and-after school prayer was addressed in a challenge to a district's policy of renting school space to a religious council that met in an elementary school. For a nominal fee, the Findley, Ohio, board provided the space so that third and fourth graders could receive religious instruction. Using dicta from two 1985 Supreme Court cases as guidance,[43] the district court concluded that impressionable eight and nine year old children would be unable to distinguish the religious programming from the rest of the school day.[44] In addition, the court found that the timing of the programs caused them to benefit from the state's compulsory attendance law. A summary judgment therefore was entered on behalf of the plaintiffs.

In a case attracting substantial national attention, a district court ruled that students had a limited right to "opt out" of elementary reading classes their parents argued would violate their religious freedom. The case had been returned to the district court by the Sixth Circuit Court of Appeals for a hearing on the question of whether the Holt, Rinehart, and Winston basic reading series infringed on the plaintiff's free exercise right and, if it did, whether the state had a compelling interest in denying the right.[45] The plaintiffs argued that the series as a whole might cause a

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42. May v. Evansville-Vanderburgh School Corp., 615 F. Supp. 761 (S.D. Ind. 1985), *aff'd*, 787 F.2d 1105 (7th Cir. 1986).

43. Wallace v. Jaffree, 469 U.S. 1102 (1985); Grand Rapids School Dist. v. Ball, 469 U.S. 1014 (1985).

44. Ford v. Manuel, 629 F. Supp. 771 (N.D. Ohio 1985).

45. Mozert v. Hawkins County Pub. Schools, 582 F. Supp. 201 (E.D. Tenn. 1984), *rev'd*, 765 F.2d 75 (6th Cir. 1985).

child to adopt "feminist, humanist, pacifist, anti-Christian, vegetarian or one-world government views." This perspective, they held, was antithetical to their Christian faith. While both parties agreed that the texts offended a set of sincerely held religious views, the case hinged on whether the state's interest was sufficiently great to permit the infringement.

The defendants argued in district court that the schools would be overburdened with a flood of other requests if the schools were required to offer parallel reading courses or design individual student programs.[46] The court avoided this argument by fashioning a specific compromise that would allow students to "opt out" of reading by spending time in a study hall. The students would be taught reading by their parents at home and tested by the school to ensure that their reading proficiency was maintained. Specific permission would have to be sought by plaintiff parents for this alternative, and it would be granted only in reading and only to parties in the case. By limiting its holding in these ways, the court found that it could accommodate the religious interests of the plaintiffs against the state's interest. Damage claims against school officials were denied because "they cannot be expected to have anticipated the ruling" and therefore must be accorded good faith immunity. A hearing on damages against the school board was held for jury trial, if there was no settlement.

The Supreme Court ruling in *Aguilar v. Felton*[47] held that programs funded by chapter 1 of the Educational Consolidation and Improvement Act of 1981, directed at children from disadvantaged backgrounds, could not be offered to eligible religious school students in private school classrooms. In order to comply with *Aguilar*, New York school officials developed a program to serve female students attending a Hasidic Jewish school. Under the plan, the students would receive chapter 1 instruction within a public school. To accommodate the tenets of their faith, a portion of the building was separated by a partition from the rest of the school, so that girl students would not come in contact with boys. Instruction would be provided in Yiddish by female public school teachers.

The plan was challenged by the parent association of the predominantly Hispanic elementary school where the instruction was to take place. Among the issues raised were the facts that only bilingual teachers were assigned to the Hasidic program and that English as a second language was offered only in that program. In overturning a district court decision not to issue an injunction against this arrangement, the

46. Mozert v. Hawkins County Pub. Schools, 647 F. Supp. 1194 (E.D. Tenn. 1986).
47. Aguilar v. Felton, 469 U.S. 878 (1985).

Second Circuit Court focused a traditional establishment law analysis.[48] Using the test found in *Lemon v. Kurtzman*,[49] the appeals court looked at whether the primary effect of the program advanced religion. The court concluded that the plan had that effect by making unique efforts to accommodate the sect's special needs, having a "magnified negative impact" on the public school students observing the program. Having decided the case on "primary effect" grounds, the appeals court observed that the district also might wish to examine the program under the "excessive entanglement" test in *Lemon* when considering whether to issue a permanent injunction.

Invocations at the start of high school commencements or other school ceremonies have led to first amendment challenges, with courts divided on whether the practice is ceremonial or religious, thereby violating the establishment clause. An Oregon appeals court heard a challenge raised by a school valedictorian who objected to a commencement prayer.[50] The court concluded that the prayer created the impression that government was endorsing religion, finding that the practice violated the Oregon Constitution. The court also awarded attorneys' fees based on the fact that the state claim was factually identical to the plaintiffs' federal civil rights claim.

A challenge to state immunization requirements was mounted on fourteenth amendment equal protection grounds and an alleged violation of "privacy rights." The plaintiffs held that they subscribed to a belief in "chiropractic ethics," which taught them that the injection of foreign substances into the body is harmful. They argued that the belief should be accorded equal weight with religious exceptions to immunization. A district court rejected these arguments.[51] The court found that the state's interest in public health outweighed any privacy interest and that the parents' philosophical belief could not be accorded equal weight with any prospective religious claim that might be made on behalf of the parents. Thus the equal protection argument was rejected and the school district won a summary judgment in favor of the immunization.

First Amendment Freedom of Expression

A nominating speech at a student assembly led to a decision by the United States Supreme Court that schools may impose disciplinary sanctions for offensively lewd and indecent speech. The controversial

48. Parents' Ass'n of P.S. 16 v. Quinones, 803 F.2d 1235 (2d Cir. 1986).
49. 403 U.S. 602 (1971).
50. Kay v. David Douglas School Dist. No. 40, 719 P.2d 875 (Or. Ct. App. 1986).
51. Hanzel v. Arter, 625 F. Supp. 1259 (S.D. Ohio 1985).

nomination was delivered at a student-run assembly by a high school senior who described his candidate, using sexual metaphor, as one who would "go to the very end—climax" on behalf of students in his school. The speech caused a substantial response from those at the meeting and resulted in a two-day suspension for the speaker.

The school argued that it had the obligation to promote "civil discourse" and that the penalty was appropriate to the disruption it had caused. A lower court issued an injunction against the suspension and the plaintiff's removal from a list of potential graduation speakers to be voted on by students. In the meantime, the student had been elected a speaker on a write-in vote. The court also awarded $278 as damages, plus costs and attorneys' fees. The Ninth Circuit affirmed, basing its decision on the fact that no "material disruption" had occurred and that the school's reliance on the need to have "civil discourse" and to prevent "indecency" was overly broad.[52]

The Supreme Court reversed, holding in a seven-to-two decision that the Ninth Circuit had not accorded appropriate weight to the school district's obligation to protect minors from offensive, sexually explicit language.[53] The Court also found that the student had received adequate notice, from teachers who had read his remarks prior to their delivery, that his speech might lead to disciplinary sanctions, and that the school rule against "obscene" language was not overly broad when the penalty was only a short suspension. "A high school asembly," the Court held, "is no place for a sexually explicit monologue directed towards an unsuspecting audience of teenage students."[54]

The extent to which school buildings, grounds, or publications are public forums was at the heart of a number of 1986 free expression cases. The Federal Equal Access Act,[55] passed by Congress in 1984, requires school districts receiving federal funds and having a "limited open forum" to make space available to students for meetings without regard to the programmatic content of the meeting. The Act was designed to extend the Supreme Court's ruling in *Widmar*, requiring access to meeting space for university student prayer groups, to the secondary school level. As the cases that follow demonstrate, however, the Act also has a substantial impact on requests from groups wishing to challenge draft registration and other social and political issues.

Access cases also rely on definitions of what constitutes a public forum, as set forth in *Perry Education Association v. Perry Local Educa-*

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52. Fraser v. Bethel School Dist. No. 403, 755 F.2d 356 (9th Cir. 1985). *See* The Yearbook of School Law 1986 at 102-3.

53. Bethel School Dist. No. 403 v. Fraser, 106 S. Ct. 3159 (1986).

54. *Id.* at 3166.

55. 20 U.S.C.A. § 4071 *et seq.* (Supp. 1985).

tors' Association.[56] *Perry* enumerated three categories of forums—public, limited public, and nonpublic. Which of the three categories a particular forum or space may constitute, and the ability of a school to regulate speech within the forum, were argued in several of the cases that follow.

Attempts by a high school student organization to hold a "Peace Fair" continued to be litigated in 1986. The Lower Marion, Pennsylvania, school board had held that the proposed activity was political in nature and a district court refused to grant a permanent injunction against the board's decision.[57] This ruling was upheld by the Third Circuit Court of Appeals, but a second lower-court decision, that the Equal Access Act did not apply, was remanded for a further hearing.[58] The Third Circuit remanded on the ground that the district court had incorrectly concluded that the Act was not meant to require open forums that included nonstudents, if such was the history of the forum in question. Thus the lower court was asked to discover whether the Lower Marion board had created this type of forum through its use of the school facilities after August 11, 1984, when the Act was signed.

The lower court examined the use of four separate areas on school grounds since the 1984 date.[59] It found that one spot, the boy's gym, had been used for a public volleyball marathon that had involved nonstudents. The court therefore concluded that this created a limited open forum and that a failure to allow the Saturday peace program in the same gym would constitute a denial based on the political content of the activity. Thus, while the school could establish reasonable rules, such as requiring participants not to wear street shoes in the gym, thereby preserving the surface of the floor, the school could not deny the first amendment rights of the participants by preventing the event.

Issues of war and peace were also heard by the Ninth Circuit Court of Appeals.[60] A suit was filed by a San Diego counseling group seeking to advise young men on alternatives to compulsory military service by placing advertisements in five high school newspapers that had published military recruiting advertisements. A district court had denied to issue a preliminary injunction and an appeal was taken. The first issue in

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56. 460 U.S. 37 (1983). *See also* Cornelius v. NAACP Legal Defense and Educational Fund, Inc., 105 S. Ct. 3439 (1985).

57. Student Coalition for Peace v. Lower Marion School Dist., 569 F. Supp. 169 (E.D. Pa. 1984).

58. Student Coalition for Peace v. Lower Marion School Dist., 618 F. Supp. 53 (E.D. Pa. 1985), *rev'd*, 776 F.2d 431 (3d Cir. 1985).

59. Student Coalition for Peace v. Lower Marion School Dist., 633 F. Supp. 1040 (E.D. Pa. 1986).

60. San Diego Comm. Against Registration and the Draft v. Governing Bd. of Grossmont Union High School Dist., 790 F.2d 1471 (9th Cir. 1986).

the appeal was whether the newspapers were limited public forums, or, as the school district argued, were nonpublic forums. The appeals court concluded that the schools' newspapers were, "at a minimum" a limited public forum. Having allowed the general public access to the papers through advertising, the court held that only a showing of compelling government interest would permit the district to exclude certain types of messages. The district failed to make such a showing and likewise did not convince the court that military recruiting ads were vocational and nonpolitical.

The Ninth Circuit Court also concluded that the failure to run the advertisements would constitute viewpoint discrimination even if the newspapers were nonpublic forums, as alleged by the district. Having concluded that military recruiting ads were of a mixed political and commercial nature, the schools could not accept them without providing equal access to an opposing point of view. The court also held that a "speculative" conclusion that the ads might lead to illegal conduct on the part of readers was not grounds for excluding them. In dissent, one judge on the three-judge panel argued that the case should have been remanded for a hearing on the question of viewpoint discrimination.

Peace activists sought the right to post and distribute literature in Atlanta's schools and to participate in "career days" where military recruiters would be present.[61] The school district and the federal government, as intervenor-defendant, sought to meet the compelling interest requirement of *Perry* by arguing that the peace activists did not have "jobs in hand," as did the recruiters. It was shown, however, that other career day participants likewise did not offer jobs. The suggestion that the needs of the military should constitute a compelling state interest for giving them "preferred" access also was rejected, since recruiters could contact students outside of school. While granting summary judgment regarding the literature and career day participation, the court deferred until trial the question of whether the merits of military service, generally, could be discussed.

In a more traditional free expression case, a principal removed articles from a school newspaper, *Spectrum*, concerning teenage pregnancy and divorce. He did so on the theory that students could be identified from the text, though no names were used in the story. In responding to the first amendment claims made by the students, a district court focused on the paper's integral connection with the school's journalism curriculum and concluded that there were sufficient grounds for the removal of the stories.[62] The plaintiffs appealed.

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61. Searcey v. Crim, 642 F. Supp. 313 (N.D. Ga. 1986).

62. Kuhlmeier v. Hazelwood School Dist., 607 F. Supp. 1450 (E.D. Mo. 1985). *See* The Yearbook of School Law 1986 at 104.

In looking at the nature of the newspaper, the Eighth Circuit Court of Appeals found that the *Spectrum's* own written policy made it a forum for the whole school.[63] While it was produced by a journalism class, the school encouraged students to express their views and they did so frequently. The appeals court then turned to the standard contained in *Tinker v. Des Moines Independent Community School District*[64] and concluded that school officials must demonstrate that the publication prohibition was "necessary to avoid material and substantial interference with school work or discipline . . . or the rights of others." The appeals court found no evidence of potential disruption and focused on whether the rights of others might be invaded by the stories. While a potential invasion is difficult to assess, courts have held that such items as a questionnaire on sex practices would meet the definition.

In the case at hand, the court concluded that only those with prior knowledge of the identities of the students or parents in the divorce article could identify particular cases. Similarly, the pregnancy article disguised identities and the subjects had participated willingly. The court therefore reasoned that neither story was an invasion of anyone's rights. The court also held that the principal had been obligated to give students the opportunity to alter their articles to conform to his concerns regarding specific identities. In dissent, one judge held that the *Spectrum* was a part of the school curriculum and that the decision forced school officials "to chart a course between the Scylla of a student-led first amendment suit and the Charybdis of a tort action by those claiming to have been injured by the publication of student-written material."[65]

A school play, *Runaways*, became the issue in a first amendment lawsuit when the East Montpelier, Vermont school board voted against its selection as a high school's spring musical.[66] The suit was brought by teachers who had selected the play and by students who had a prospective interest in being in the cast. Both sides addressed the question of whether the board's decision "directly and sharply implicates" the students' first amendment rights. For the district court, its refusal to rule in favor of the plaintiffs rested on the fact that the play remained within the school curriculum, where it was read and discussed in the school's humanities course. This left, then, the question of whether the board should be compelled to accept *Runaways* for public presentation. The court found that the board was appropriately concerned that the play's adult themes, including sexual violence and drug abuse, might be too

63. Kuhlmeier v. Hazelwood School Dist., 795 F.2d 1368 (8th Cir. 1986).
64. 393 U.S. 503 (1969).
65. 795 F.2d 1368, 1378-9 (1986).
66. Bell v. U-32 Bd. of Educ., 630 F. Supp. 939 (D. Vt. 1986).

disturbing for some students. Thus the court granted a summary judgment to the board, holding that the plaintiffs' free expression claims must give way to concerns "for the well-being of the larger student body."

SANCTIONS FOR STUDENT MISCONDUCT

Suspensions and Expulsions

Litigation involving exclusionary discipline grew in 1986, in large measure because of an increase in the number of drug-related cases in which plaintiffs were expelled for possession or sale of controlled substances. Expulsion cases generally involve claims that procedures were faulty. While most states have statutory requirements regarding expulsion procedures, courts generally grant some latitude to districts in expulsion hearings, so long as students are accorded such fundamental rights as clear charges, representation, and the opportunity to cross-examine witnesses. While the power of schools to punish students for in-school violations is clear, a number of 1986 cases raised the question of the school's power to discipline students for out-of-school violations. Substantive claims also were advanced regarding the use of expulsion for drug use, with courts generally finding that the penalty was not excessive.

Two cases arose out of an undercover police investigation into drug abuse in a Louisiana public school district. In the first, a student produced and smoked a marijuana cigarette in the car of an undercover officer, parked in the school parking lot. The court rejected the student's attempt to bar the testimony of the officer and affirmed the school board's decision to expel him.[67] The student unsuccessfully argued that a state statute prohibited school boards from admitting in expulsion hearings the testimony of persons who were not school employees. The court also held that the confidentiality requirements in the state juvenile code were not applicable in proceedings involving the discipline of pupils.

The second case involved a student who was accused of smoking marijuana in a privately owned trailer located a short distance from the school. The student's subsequent expulsion also was based upon evidence presented by an undercover officer who witnessed the act. Unlike the first case, the student successfully sought injunctive relief from the school board's expulsion decision.[68] The court ruled that a principal's power to expel a student for drug possession is limited to possession on

67. Abadie v. Saint Bernard Parish School Bd., 485 So. 2d 596 (La. Ct. App. 1986).
68. Labrosse v. Saint Bernard Parish School Bd., 483 So. 2d 1253 (La. Ct. App. 1986).

school property or in school buses. The court also found that the student's due process rights had been violated because a lower court allowed the district to add charges not contained in the original expulsion notice.

In another case raising the issue of the limits of school authority, a Maine district court held that a student could not be suspended from school for making a vulgar gesture to a teacher after school hours and far from the campus.[69] The court found that the connection between the student's act and the orderly operation of the school was "far too attenuated" to support the discipline charge.

A Mississippi girl lost all credit for a semester when she admitted to school authorities that she had a few sips of beer at home before attending the last day of school.[70] In sustaining a lower court award of $1 for damages, the Mississippi Supreme Court found that the school board's letter to the parents setting a hearing date failed to specify charges as required by state law. The student received no notice of witnesses and there was no evidence that the beer consumption caused disruption in school. The board also acted improperly when it expelled the student while having no rule against off-campus consumption of alcoholic beverages.

An Indiana student who admitted that he had smoked marijuana on school grounds appealed his expulsion on substantive due process grounds, arguing that the penalty was excessive.[71] An appeals court rejected his contention that the school was required to consider whether the violator was brighter or more popular than his peers before it expelled him. Expulsion for the remainder of the school year was not found to be excessive.

In a similar case, a student appealed the decision of a state board of education affirming his expulsion from school for possession of marijuana.[72] The court rejected the student's procedural claims, ruling that he had no right to a hearing officer who is not an employee of the district. The court also concluded that the school district's policy of recommending expulsion for the possession of controlled substances was not excessive, finding it "a commendable effort in dealing with a serious, destructive problem."[73]

An Alabama student who had admitted he brought alcohol onto school grounds challenged the local school board's expulsion decision.[74]

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69. Klein v. Smith, 635 F. Supp. 1440 (D. Me. 1986).
70. Warren County Bd. of Educ. v. Wilkinson, 500 So. 2d 455 (Miss. 1986).
71. Forrest v. School City of Hobart, 498 N.E.2d 14 (Ind. Ct. App. 1986).
72. Rucker v. Colonial School Dist., 517 A.2d 703 (Del. Super. Ct. 1986).
73. *Id.* at 705.
74. Adams v. City of Dothan Bd. of Educ., 485 So. 2d 757 (Ala. Civ. App. 1986).

The court summarily rejected his novel argument that he would be unable to attend school if expelled, leading the expulsion to violate the state compulsory attendance law. It also concluded that the provisions of the student conduct code were clearly stated and constituted a reasonable response to what was a major crisis of drug and alcohol abuse in the local schools.

An Indiana court dealt with the question of whether the claim of students expelled for allegedly possessing marijuana was moot.[75] The students had succeeded in winning a preliminary injunction that allowed them to attend classes for the remainder of the term. Upon an appeal by the school district, the appeals court ruled that the issue of the injunction was moot since the relevant school year had already ended. But it also concluded that the matter of whether they were properly expelled was not moot. Since the record was silent on the question of whether the grades from the disputed semester were necessary for the receipt of their diplomas, the court remanded the case for further proceedings.

High school students who were repeatedly suspended for smoking brought suit challenging the school board's rule prohibiting the offense.[76] The court rejected their claims, holding that the ban on smoking was not comparable to hair length regulations or dress codes. The fact that the district allowed teachers to smoke while denying students the privilege also was found not to constitute an equal protection violation. The court concluded that the purpose of the ban was to "prevent impressionable, susceptible adolescents from becoming addicted to tobacco products," and therefore did not apply to adults.

A high school student who was suspended for violations of the school's drug policy claimed that her due process rights had been violated.[77] After exhausting the available administrative appeals and a defeat in a local court she chose to abandon further relief in the state courts. Instead, she brought suit in a United States district court. The federal court ruled that the suit was barred by collateral estoppel principles since the same issues had been raised and resolved earlier in a local state court.

In a similar case, a former high school student filed identical complaints in state and federal courts alleging that his due process and equal protection rights had been violated by school officials who had expelled him for consuming alcohol at a school-sponsored event.[78] A federal district court granted the involved school officials a stay of federal

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75. Bremen Pub. Schools v. Varab, 496 N.E.2d 125 (Ind. Ct. App. 1986).
76. Craig v. Buncombe County Bd. of Educ., 343 S.E.2d 222 (N.C. Ct. App. 1986).
77. Myers v. Daubert, 633 F. Supp. 45 (E.D. Pa. 1986).
78. Kent v. Cook, 637 F. Supp. 1005 (N.D. Ind. 1986).

proceedings pending the resolution of state claims. The federal case had been filed almost two years after the plaintiffs appeared in state court.

While drug cases predominated in 1986, a number of lawsuits dealt with student insubordination, fighting, and threats of violence. In a West Virginia case, four students were expelled from school for making false bomb threats that resulted in the closing of schools on several occasions.[79] The students requested a writ of mandamus requiring the school to reinstate them. The court refused to issue the writ, finding that the one-year expulsion was not grossly disproportionate to the acts committed. The West Virginia court also noted that the state code limits the length of an expulsion from school to one year. The students were expelled during the spring of 1986 and would miss the fall semester of that year. Recognizing that it would be very difficult to resume classes in the middle of a semester, the court ordered that they be readmitted at the beginning of the 1987 spring semester so that they would not lose more than one year of school credit.

A student who had been behaving aberrantly for several days was suspended and eventually expelled for intruding on several classes with a baseball bat, touching female teachers, and violently resisting arrest. He alleged that his constitutional rights to due process and to medical care had been violated. At the disciplinary hearing he was afforded the opportunity to present his version of the incident, but his attorney was not allowed to examine witnesses or participate in any manner. Following the hearing he was suspended from school for ninety days, and the recommendation was made that he be expelled. An expulsion hearing was held where he and his attorneys were allowed to cross-examine witnesses, as well as present evidence and witnesses on his behalf. A federal district court concluded that the student had received adequate due process.[80] The additional trial-type requirements, such as formal rules of evidence, called for by the student were found not necessary under state law. The court also concluded that it did not have jurisdiction over the question of whether he was denied adequate medical care.

A Pennsylvania high school student challenged a suspension for fighting that would have prevented him from attending his graduation ceremonies.[81] He succeeded in attaining a court order that reinstated him in school and allowed him to graduate with his class, but the school appealed. Even though the student had graduated, the court decided to hear the case because it involved an important public question. It concluded that the student had no property right to attend graduation exercises, but that his suspension was invalid because the school district

79. Keith D. v. Ball, 350 S.E.2d 720 (W. Va. 1986).
80. Sykes v. Sweeney, 638 F. Supp. 274 (E.D. Mo. 1986).
81. Mifflin County School Dist. v. Stewart, 503 A.2d 1012 (Pa. Commw. Ct. 1986).

had failed to adhere to procedural requirements by failing to give him written notice of the reason for the suspension.

Kansas students and their parents contended that their due process rights had been violated by several disciplinary actions taken by school officials.[82] The case involved two separate incidents. In the first, several high school students and two former students admitted that they had participated in vandalizing a local grade school. The students were subsequently suspended and the nonstudents were prohibited from attending any of the local high school's extracurricular events. The second incident involved two students who were repeatedly reprimanded at a basketball game by their school's athletic director for "antagonizing supporters of the opposite team." The following day the principal forbade them from attending the next basketball game. They ignored the order but complied with the principal's instructions that they not attend a later game. The court concluded that the students suspended for vandalism had received all the due process to which they were entitled. It found that although they had been denied a hearing, the fact that the "students admitted their guilt" made one unnecessary. The court also held that students did not have a constitutionally protected right to attend athletic events. Finally, it ruled that the parents had no standing to assert that their own due process rights had been violated. The court found that the school had fulfilled its obligation of giving the parents written notice of the suspension within twenty-four hours and rejected the argument that the parents had the substantive right to challenge the discipline imposed.

A student who allegedly directed obscenities towards school officials challenged disciplinary action taken against her.[83] The student received two five-day suspensions from the school principal and, following a disciplinary hearing, was suspended for the remainder of the school year by the superintendent of the district. The court ruled that the suspension section of the district code did not, at the time, give authority to principals to levy such penalties. While more explicit guidelines had been enacted since the episode, they did not go into effect until the student already had received the penalty. Therefore, her school records were expunged of references to the suspensions. Nevertheless, the court concluded that the superintendent did have the authority to suspend her for the remainder of the year and upheld his decision.

A former high school student brought suit challenging a school board policy of reducing grades for unexcused absences.[84] The court

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82. Boster v. Philpot, 645 F. Supp. 798 (D. Kan. 1986).

83. Underwood v. Board of Educ. of City School Dist., 498 N.Y.S.2d 907 (App. Div. 1986).

84. Hamer v. Board of Educ., 488 N.E.2d 1096 (Ill. App. Ct. 1986).

ruled that the student did not have standing to sue because the grade reduction she suffered was in physical education courses that had no impact on her final class standing. It also found that her claim was moot because she had graduated from high school and was about to graduate with a high grade point average from the college of her choice. Finally, the court concluded that the public interest in the grade reduction policy was insufficient to warrant an exception to the mootness doctrine.

Corporal Punishment

Corporal punishment cases arise when the paddling of students, permitted by the laws of some states and the policies of school districts, results in injury claims. Courts generally find for defending school districts, absent claims that policies regulating the penalty were not followed or a showing that the penalty was administered excessively. In one such case, a Louisiana father brought suit when his son came home with bruises on his buttocks and later had signs of what a psychiatrist testified to be "post traumatic stress disorder." A trial court ruled that the student's behavioral history suggested that his need for behavioral counseling was unreleated to the paddling and that the penalty itself was not administered in such a way as to aggravate the boy's preexisting emotional state. An appeals court sustained this ruling.[85]

A Michigan student brought suit for battery and unreasonable use of force against a teacher who used a "full nelson" to wrestle a student to the principal's office. The student had arrived late to class and caused a disruption of student presentations under way at the time, kicking a wastebasket. On appeal, the student's parents challenged the judge's instruction to a jury and raised other procedural and substantive objections to a lower-court verdict favoring the school system.[86] Among these numerous claims, all of which were rejected by the court, the plaintiffs alleged that the lower-court judge had failed to instruct the jury regarding the tenets of Michigan's corporal punishment law. While cases involving corporal punishment in Michigan "are few," the appeals court found the judge's instruction that "reasonable physical force" could be used was an adequate description.

TESTING AND PLACEMENT

Placement cases often are initiated by individuals challenging the use of standardized tests on the grounds that they have the effect of

85. Harrell v. Daniels, 499 So. 2d 482 (La. Ct. App. 1986).
86. Willoughby v. Lehrbass, 388 N.W.2d 688 (Mich. Ct. App. 1986).

segregating schools along racial lines. While one 1986 case fits this description, there was also a sharp growth in the number of cases filed by parents who believe that their child should be placed in more academically advanced classes or in special programs for the gifted.

A Pennsylvania school district challenged the order of that state's secretary of education that it provide a mentally gifted student with a special, individualized instruction program in addition to the district's existing enrichment program.[87] The case began when the parents of a gifted child and their school district could not reach an agreement on an appropriate individualized education program. Following a special hearing, the presiding official concluded that the child in question was very advanced academically in spite of his inconsistent school work. The hearing officer recommended that the child participate in the district's enrichment program and that he should receive special, individualized instruction within the normal classroom setting. The state secretary agreed with the recommendation, and the court concluded that the secretary had the authority to determine the appropriate individualized program.

In a similar case, the parents of a student with exceptional mathematics skills challenged an order of the Pennsylvania secretary rejecting a hearing officer's recommendation that the boy be provided with a classroom-taught calculus course.[88] The court concluded that the secretary's finding was reasonable, given the testimony of school officials who felt the student had been taking math courses to the detriment of his other studies and that he had been accelerated "too far and too fast" in mathematics. It also noted that the student could learn additional mathematics without enrolling in a special course.

The parents of another Pennsylvania student who was denied admittance into a gifted education program, because she scored only a 121 instead of the minimum requirement of 130 on an IQ examination, challenged her exclusion on a variety of constitutional grounds.[89] The court found that neither the student's liberty nor property interests were abridged by the lottery and, using a rational relationship test, that the use of the cutoff point was a reasonable means of program entry.

The parents of a New York student identified on tests as being mentally gifted sought a court order compelling their school district to admit the child into its gifted student program.[90] Because of cost constraints, a lottery was employed to select the students for full-time talented and gifted instruction, while the remaining eligible students were

87. Centennial School Dist. v. Commonwealth, 503 A.2d 1090 (Pa. Commw. Ct. 1986).
88. Scott S. v. Commonwealth, 512 A.2d 790 (Pa. Commw. Ct. 1986).
89. Student Roe v. Commonwealth, 638 F. Supp. 929 (E.D. Pa. 1986).
90. Bennett v. City School Dist. of New Rochelle, 497 N.Y.S.2d 72 (App. Div. 1985).

afforded the opportunity of participating in a modified, part-time program. The court concluded that state statutes did "not impose . . . an affirmative duty to provide programs for the gifted, nor to place every pupil identified as gifted into an existing program."[91] It also held that the use of a lottery to satisfy the limited size of the program was neither arbitrary nor capricious.

The parent of another New York student who was discharged from a high school for the gifted on academic grounds brought legal action seeking her reinstatement.[92] The court refused to intervene, reasoning that her right to an education had not been infringed upon because she was still free to attend her local high school. It also found that she had been given an opportunity by school officials to present her case and that the full formalities of a traditional legal proceeding were not required.

A nonprofit Colorado corporation interested in improving the quality of education received by Hispanic students sought the disclosure of standardized test scores, with the test results coded to indicate the ethnic background of the test takers. A state appeals court overturned a lower court decision and ordered that the records should be disclosed after the names of the students were deleted, the order of the test results scrambled, and the scores coded to reflect whether the test takers were of Anglo or Hispanic origin.[93]

Finally, in a continuation of litigation reported last year, a federal district court considered attorneys' fees in a case that dealt with an allegation that a student was discriminated against by school officials in her placement into a math class of predominantly black students. Following a finding that she had not been a victim of discrimination, the school district moved for a fee award. The court concluded that the student's action was so frivolous and without foundation that the district was entitled to fees.[94]

DESEGREGATION

Desegregation cases in 1986 focused on one of two major issues. The first, reported in the section on plan oversight, concerned claims by districts that they had achieved unitary status and no longer required federal court supervision. Arguments involving the burden of proof necessary to reopen cases in unitary districts were heard by two federal courts of appeal, with the opposite conclusion reached in the two cases.

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91. *Id.* at 78.
92. Spencer v. New York City Bd. of Higher Educ., 502 N.Y.S.2d 358 (Sup. Ct. 1986).
93. Western Servs., Inc. v. Sargent School Dist., 719 P.2d 355 (Colo. Ct. App. 1986).
94. Bond v. Keck, 629 F. Supp. 225 (E.D. Mo. 1986). See The Yearbook of School Law 1986 at 111.

The second issue concerned attempts by school districts and states to avoid paying the multimillion dollar price tag for implementing desegregation plans. Disputes over the financial responsibility for desegregation are reported in the cross-district remedies section. Finally, there were two 1986 state court desegregation cases, causing a reintroduction of that topic heading.

Systemwide Remedies

The Ninth Circuit Court of Appeals ruled in 1984 that busing had been used for "everything except integration" in finding that the San Jose, California, school board had acted with segregative intent in developing a neighborhood school policy and in siting new schools.[95] Following *Columbus Board of Education v. Brinkman*,[96] the appeals court found that the plaintiffs in the case had demonstrated that the school board acted without regard to the "foreseeable consequences" of its decisions on racial balance. The case was remanded to the district court for the development of a remedy.

In developing its response, the school district sought to convince the court that a voluntary magnet program would be adequate. The court, however, ordered a comprehensive plan. A hearing over the details of the plan commenced in late 1985 and resulted in a decision to create five magnet schools and sixteen schools with specialty enrichment programs.[97] While parental choice would initially be used in program selection, forced choice might be required if desegregated schools did not result. Additional portions of the order addressed the appointment of a compliance monitor and other aspects of the plan.

In a decision addressing the education components of a lawsuit involving both housing and school segregation, both sides approved a remedy to address racial imbalance in the schools of Yonkers, New York.[98] A district court had ruled in 1985 that both the city and school board of Yonkers had acted in ways that were intentionally segregative.[99] In its consent decree, the court approved plan details for systemwide desegregation, including the use of magnet schools, busing, and a human relations program to help ensure the plan's effectiveness. A court monitor will be appointed to oversee the process.

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95. Diaz v. San Jose Unified School Dist., 733 F.2d 660 (9th Cir. 1984). See The Yearbook of School Law 1985 at 121-2.
96. 443 U.S. 526 (1979).
97. Diaz v. San Jose Unified School Dist., 633 F. Supp. 808 (N.D. Cal. 1985).
98. United States v. Yonkers Bd. of Educ., 635 F. Supp. 1538 (S.D.N.Y. 1986).
99. United States v. Yonkers Bd. of Educ., 624 F. Supp. 1276 (S.D.N.Y. 1985).

Cross-district Remedies

Cases in this section involve the presentation of claims that school districts adjacent to those where segregated schools are located, or states through official action, have created or perpetuated segregation. Proposed remedies include state financial assistance to achieve desegregation or cross-district plans that move students to create racial balance. Cross-district cases become complicated when plaintiffs file motions challenging certain aspects of desegregation plans. Most cases reported in this section, then, have been under way for some years and offer little prospect that they will be settled in the near future.

Kansas City's massive magnet plan, involving 70% of the students in the district, was argued before the courts in 1986. At issue before the district court was the division of the $87 million three-year cost for the plan, with local and state defendants seeking to reduce their financial responsibility for the program and related upgrading of facilities.[100] The court's decision ultimately divided the cost on approximately a three-to-one basis for the first two years, with the state paying the largest share. A one-year tax levy rollback was enjoined so that the local defendants could receive part of the funding necessary for its share. The state also was invited to change its laws regarding local board issues so that it would be easier for Kansas City to pass a capital bond issue for school improvements. The mandated state share of the plan would be reduced by the amount of the local bond issue, thereby providing an inducement to the state to change the requirement that two-thirds of the voters approve a bond referendum, making the new requirement a simple majority vote.

A portion of the decision was appealed by plaintiffs in the case, who argued that the district court had erred in finding that Kansas City suburban districts had no effect on segregation in the city. The plaintiffs also argued that the United States Department of Housing and Urban Development (HUD) should not have been dismissed as a party in the case. Division of the cost of the remedy also was at issue in the appeal, which was heard en banc by the Eighth Circuit Court of Appeals.

The appeals court split five-to-three on each of the issues presented, with the dismissal of the suburban and HUD defendants upheld, and a change in the financing plan.[101] While the total sum required for the plan was approved, the local share was increased to 50%. The appeals court observed that a fifty-fifty split had been the rule in similar cases[102] and

100. Jenkins v. Missouri, 639 F. Supp. 19 (W.D. Mo. 1985).

101. Jenkins v. Missouri, 807 F.2d 657 (8th Cir. 1986).

102. Milliken v. Bradley, 433 U.S. 267 (1977); Penick v. Columbus Bd. of Educ., 519 F. Supp. 925 (S.D. Ohio 1980), *aff'd*, 663 F.2d 24 (6th Cir. 1981), *cert. denied*, 455 U.S. 1018 (1982).

found that a similar distribution was warranted in the case at hand. In reaching this division, the court observed that the property tax levy for the Kansas City district was significantly lower than that for surrounding suburban school districts.

The Eighth Circuit Court of Appeals, for the ninth and tenth times, also heard appeals from parties involved in desegregation litigation in St. Louis. The case in recent years has focused on financing the plan agreed to in 1983 by St. Louis and surrounding suburban districts. The plan involved the use of magnet schools and voluntary student transfers, supplemented by substantial capital improvements to St. Louis schools. The Eighth Circuit in 1984 approved a funding formula for the plan that required the state to fund one-half the cost of reducing pupil-teacher ratios and the intradistrict magnets plus all the cost of capital and operating costs of the interdistrict magnet schools.[103]

At issue in the first 1986 St. Louis case heard by the appeals court was what the court characterized as "footdragging" by the state defendants.[104] The court praised some of the progress made in implementing the plan, including the fact that 7,000 black students were attending suburban schools, that 60,000 students were participating in part-time integrative programs, and that student-teacher ratios in nonintegrated schools were declining sharply. But the court found the need to "be more precise" regarding the lack of progress it observed in the capital improvement program and the magnet schools, where only a handful of white students had enrolled. The court ordered a goal of 2,000 participants for 1987-88 and 6,000 by 1989-90. After specifying which disputed costs should be included in the state share, the court reaffirmed its previous decisions regarding magnet school and teacher ratio costs.

In its 1984 decision, the Eighth Circuit directed the board to submit a $20 million capital bond issue to the voters. The board did not comply, submitting a larger issue and fighting for its passage. The measure lost, however, and the appeals court again in 1986 ordered the $20 million plan sent to the voters "at the earliest possible date."[105] If the measure again fails, the appeals court ordered the district court to follow procedures for obtaining the funds enumerated in the court's en banc opinion in 1984.

In the second 1986 St. Louis case, the issue of state funding for the intradistrict magnets again was considered.[106] At issue was funding for the specialized components of the magnets. The Eighth Circuit Court

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103. Liddell v. Board of Educ., St. Louis, 731 F.2d 1294 (8th Cir. 1984), *cert. denied*, 469 U.S. 816 (1984).
104. Liddell v. Board of Educ., St. Louis, 801 F.2d 278 (8th Cir. 1986).
105. *Id.* at 284.
106. Liddell v. Board of Educ., St. Louis, 804 F.2d 503 (8th Cir. 1986).

remanded the case to the district court with instructions to reexamine the state's responsibility for the expenses. The court also denied the state's request for a rehearing en banc of the appeals court's first 1986 case.

The responsibility of the state of Texas to pay for desegregation in Lubbock was heard by the Fifth Circuit Court of Appeals.[107] A district court had ruled that the Lubbock district could not seek to require the state to pay a portion of the costs, and this ruling was affirmed on appeal. In earlier litigation, the school district had not pleaded the state as a party in the case, though arguably the state had a role. Having failed to involve the state in earlier litigation, the Fifth Circuit concluded that the school district's current attempt to do so was "belated" and an "end-run" attempt to secure state funds.

Using the United States Supreme Court guidelines in *Milliken v. Bradley*,[108] an Arkansas district court held in 1984 that Little Rock and two adjacent districts had adjusted district boundaries in such a way as to cause interdistrict segregation.[109] The Eighth Circuit Court of Appeals approved most of the lower court's decision, but held, however, that the court-ordered boundary changes exceeded the scope of the violation.[110] The district court's reconsideration of the boundary adjustment was again before the Eighth Circuit in 1986.[111] The district court had ordered a one-time school district boundary intended to promote a sixty-to-forty ratio between black and white students in the Little Rock district. The court went further, however, developing a plan for a flexible system whereby the boundary line would change whenever Little Rock annexed additional territory. The appeals court rejected the flexible approach, holding instead to its previously expressed preference for a school district boundary line set at one point in time. The appeals court reasoned that, should future expansion result in a line that constituted a constitutional violation, the district court then could intervene. The appeals court then approved the district court's slight modification of the line, made since the higher court last considered the case.

A federal district court clarified the standing of certain defendants in Milwaukee's desegregation litigation.[112] Parties in the case were then given leave to file amended complaints. The court also refused to

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107. United States v. Texas Educ. Agency, 790 F.2d 1262 (5th Cir. 1986).

108. 418 U.S. 717 (1984).

109. Little Rock School Dist. v. Pulaski County Special School Dist., 584 F. Supp. 328 (E.D. Ark. 1984). See The Yearbook of School Law 1985 at 124.

110. Little Rock School Dist. v. Pulaski County Special School Dist., 778 F.2d 404 (8th Cir. 1985), *cert. denied*, 106 S. Ct. 2926 (1986). See The Yearbook of School Law 1986 at 114.

111. Little Rock School Dist. v. Pulaski County Special School Dist., 805 F.2d 815 (8th Cir. 1986).

112. Board of School Directors of Milwaukee v. State, 649 F. Supp. 82 (E.D. Wis. 1985).

dismiss the central claim in the city's case, holding that twenty-four suburban districts had committed intentional constitutional violations by maintaining vocational and exceptional student programs that involved interdistrict transfers among the suburbs while excluding the city of Milwaukee.

The school board in Richmond, Virginia sought to require the state to provide additional funding for remedial and compensatory programs, arguing that such programs were necessary to eliminate the vestiges of state-mandated school segregation.[113] For the district court, the claim hinged on whether the school district had demonstrated that the effects of past discrimination had not been eliminated. The court concluded that the district had not met this burden, pointing to the fact that student test scores suggested that Richmond students were competing favorably when compared to state and federal norms. To the extent that the state had some lingering responsibility, its current remedial funding was held to be adequate to meet local needs. The court also emphasized that its decision was directed only at state-mandated segregation, though some segregation attributable to other causes might remain. Finally, without discussion, the court released the district from court supervision, holding that it had achieved unitary status. The Richmond case began in 1961, and the current plan had been under court suspension since 1972.

Desegregation Plan Oversight

Once a school district has attained unitary status and is freed from court supervision, plaintiffs in subsequent litigation have the burden of demonstrating that school boards have acted with intent to segregate pupils on the basis of race.[114] Subsequent population shifts creating racial imbalance in the schools need not necessarily require school boards to take steps to desegregate, so long as boundary decisions or other official actions have not contributed to the resegregation.[115] Two 1986 decisions by federal courts of appeal reached differing conclusions, however, on the question of what power federal courts have to reopen desegregation cases.

The two cases had remarkably similar fact situations. In the first, an appeals court ruled that a school district could stop court-approved busing, observing that the district had acted without an intent to resegregate. In the second, a different federal appeals court held that no

113. Bradley v. Bahles, 639 F. Supp. 680 (E.D. Va. 1986).
114. *See* Washington v. Davis, 426 U.S. 229 (1976).
115. *See* Pasadena City Bd. of Educ. v. Spangler, 427 U.S. 424 (1976).

showing of intent was necessary because the busing was part of a previous court order. It ordered the busing to continue over the objections of the school board. Adding to the confusion, the United States Supreme Court refused to hear either case. The issue, then, is whether districts have an obligation to maintain previous desegregation agreements under what school boards consider to be changed circumstances.

In the first case, in a decision made in 1984 but published in 1986, a Virginia district court held that the Norfolk public schools could cease a massive busing program involving elementary children.[116] The district had been declared unitary in 1975. The school board's decision to halt the busing was based on its judgment that white flight from the system would be reduced by its termination. The court also ruled that the plaintiffs had failed to show that the board's decision was motivated by discriminatory intent. The district court's decision was affirmed by the Fourth Circuit Court of Appeals.[117] The appeals court agreed that the end of mandatory busing, with a provision for free transportation for minority students desiring it, would offer the best chance of stabilizing enrollment in the district. In a unitary system free from the effects of past de jure discrimination, the court concluded that "the school boards and not the federal court will run the schools, absent a showing of an intent to discriminate."[118]

In a case involving elementary school busing in Oklahoma City, a district court refused to reopen a desegregation case that had been closed in 1977.[119] The school board recently ended busing for students in grades one through four and had reestablished neighborhood schools for students in those grades, while continuing busing for other grades. As a result of the plan, thirty-three of sixty-four elementary schools would be attended by students who are 90% or more from one race. The Tenth Circuit Court of Appeals held that the district court had improperly placed the burden of proof on the plaintiffs to show discriminatory intent.[120] Unlike the Fourth Circuit, the Tenth Circuit found that a previous decision declaring a district unitary was no bar to litigation challenging changes in a previous mandatory injunction. The case, therefore, was remanded for a hearing on the plaintiff's charges.

The conflicting federal courts of appeal decisions were cited by opposing parties in the ongoing litigation involving desegregation in

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116. Riddick v. School Bd. of Norfolk, 627 F. Supp. 814 (E.D. Va. 1984).

117. Riddick v. School Bd. of Norfolk, 784 F.2d 521 (4th Cir. 1986), *cert. denied*, 107 S. Ct. 420 (1986).

118. *Id.* at 543.

119. Dowell v. School Bd. of Okla. City, 606 F. Supp. 1548 (W.D. Okla. 1985).

120. Dowell v. School Bd. of Okla. City, 795 F.2d 1516 (10th Cir. 1986), *cert. denied*, 107 S. Ct. 426 (1986).

Chattanooga, Tennessee. A district court had ruled that the Chattanooga plan for desegregation had been fully implemented, save for the portion related to faculty and staff.[121] The court then found that the faculty and staff integration plan was not under way and that it was the last step needed to make a unitary system.[122] The court concluded that, unlike the Oklahoma City plaintiffs, their Tennessee counterparts had been afforded the opportunity to challenge the district's plan and were unable to show that the district was not unitary. The plaintiffs were awarded costs by the court.

A Mississippi district court considered claims by desegregation plaintiffs that previous court orders had been violated and that the Lawrence County school district should be prevented from modifying school attendance zones and that school construction plans should be modified.[123] The court refused to fined for the plaintiffs and an appeal was made. The Fifth Circuit Court of Appeals first considered what it meant by a 1974 ruling in which it appeared to declare that the district was being run as a unitary school system. The appeals court decided that the term "unitary" referred only to the fact that the system appeared to have complied with an outstanding order.[124] Jurisdiction in the case had been returned to the district court in its 1974 decision and the appeals court now observed that the retention of jurisdiction was further evidence that the case was to continue.

Turning to the substance of the latest appeal, the Fifth Circuit found that the county school board had continued a policy of permitting students to enroll in schools outside their attendance zone, had failed to develop a transportation plan, and had assigned staff without regard to the segregative impact of these actions. The appeals court therefore reversed the district court's decision, ordering the court to modify the attendance zones, take action on teacher assignments, and consider more extensive busing, perhaps with the advice of a court-appointed monitor.

The correct role of the district court in monitoring a desegregation plan was at issue in a brief opinion by the Eleventh Circuit Court of Appeals.[125] A Florida district court had issued an order approving a Duval County school system plan for a school closing and the conversion of another school into a magnet center. While the court had invited the plaintiffs to comment on the plan, it refused their request for a hearing. The appeals court found that the court had an obligation to grant the

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121. Mapp v. Board of Educ. of Chattanooga, 630 F. Supp. 876 (E.D. Tenn. 1986).
122. Mapp v. Board of Educ. of Chattanooga, 648 F. Supp. 992 (E.D. Tenn. 1986).
123. United States v. Lawrence County School Dist., 626 F. Supp. 940 (S.D. Miss. 1986).
124. United States v. Lawrence County School Dist., 799 F.2d 1031 (5th Cir. 1986).
125. Mims v. Duval County School Bd., 784 F.2d 1107 (11th Cir. 1986).

request and had failed to follow established standards for amending a desegregation plan.

The often-stormy litigation involving Chicago's school desegregation plan continued in 1986, with the district court expressing appreciation that the parties had reached at least a partial resolution of the dispute regarding funding for the plan.[126] Funds for two areas, however, remained unsettled, with the federal government claiming that discretionary funds to be used in ten schools did not satisfy federal guidelines requiring innovative programming and that bilingual programs developed by the city also failed to meet federal criteria. On the first point, the court agreed that aspects of the ten-school plan were not innovative, but that the scheme met the innovative requirement when considered in its entirety. The court also sorted out questions regarding the bilingual program, finding that the district could not use student tutors, as it had proposed. The parties were urged to work together to develop programs following the guidance provided in the opinion.

The use of ethnic quotas in a Chicago elementary magnet school also was heard in two 1986 Seventh Circuit cases. In the first, plaintiffs representing Cuban, American Indian, and white students challenged the plan for the magnet school on the ground that admission standards favored other ethnic groups. The appeals court dismissed their appeal for an interlocutory order, holding that the lower court retained jurisdiction over claims raising the same constitutional issues as those asserted by the plaintiffs in their appeal.[127] Hence the appeals court held that it lacked jurisdiction and that the appeal was premature.

Following the Seventh Circuit decision, the district court dismissed the plaintiff's constitutional claim regarding the preferential admissions treatment received by some groups at the magnet school. The plaintiffs then appealed the issue for a second time. In addressing the substance of the issue, the Seventh Circuit court found that the plaintiff's claim represented a collateral attack on a desegregation plan, similar to a previous claim filed earlier that already had been found wanting.[128] The appeals court reaffirmed its view that portions of a desegregation plan might have constitutional infirmities, so long as the overall plan contributed to the goal of desegregation.

Litigation continued in Dallas regarding the use of educational centers for elementary school students.[129] The centers previously had

126. United States v. Board of Educ., Chicago, 624 F. Supp. 208 (N.D. Ill. 1986).
127. Samayoa v. Board of Educ., Chicago, 783 F.2d 102 (7th Cir. 1986).
128. Samayoa v. Board of Educ., Chicago, 799 F.2d 1048 (7th Cir. 1986).
129. Tasby v. Wright, 730 F. Supp. 707 (N.D. Tex. 1988). In an earlier decision, the NAACP unsuccessfully sought to reenter the Dallas suit. See Tasby v. Wright, 109 F.R.D. 296 (N.D. Tex. 1985).

been approved by federal courts as an alternative to busing. The sprawling district, 351 square miles, serves predominantly (78.2%) students from minority groups. In its 1986 decision, the district court again approved the use of centers, this time for grades four through six in North Dallas, concluding that busing no longer contributed significantly to integration and had become, because of white flight, "essentially meaningless" as a desegregation tool.

A Tennessee district court refused a proposal by the Shelby County school board to add classrooms to a largely white school while refraining from redrawing attendance zones to relieve overcrowding.[130] While the zone change would have forced white students to attend schools having a larger proportion of minority children, none of the schools in the county had a majority of minority students in attendance. In ordering a new plan for the district, the court observed that the system had allowed "fear of community opposition" to interfere with its obligation to select a less expensive alternative that also would have furthered desegregation.

Plaintiffs in New York argued that the Queens district, starting in 1970, had made decisions affecting racial balance that now caused the proposed closing of a predominantly black and Hispanic junior high school.[131] They also alleged that the board made other administrative decisions that made the school a more ready target for closing. The district court, however, found that its ability to reopen the entire plan to scrutiny was precluded by previous appeals court decisions and that the other decisions made by the board were "wholly insufficient" to serve as evidence that the board had intended to close the school.

The city of Jefferson, Georgia appealed an unpublished district court order declaring that the schools of Jackson County had achieved unitary status.[132] In a per curiam decision, the Eleventh Circuit concluded that the district court should be upheld, even though it "incorrectly reasoned its way to that decision." The United States, as a party in the case, had urged that unitary status should be defined to mean that all previous orders in the case would be dismissed by such a declaration. This perspective was rejected by the appeals court, with the observation that parties would never negotiate equitable settlements to desegregation disputes if these might be dissolved in the future. The correct ground for the declaration that the Jackson County case had ended, then, was the fact that the district court's 1970 order in the case had been complied with by the parties.

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130. Robinson v. Shelby County Bd. of Educ., 743 F. Supp. 111 (W.D. Tenn. 1986).

131. Parent Ass'n of P.S. 50 v. Queens Community School Dist. No. 28, 625 F. Supp. 1505 (E.D.N.Y. 1986).

132. United States v. Board of Educ. of Jackson County, 794 F.2d 1541 (11th Cir. 1986).

State Court Cases

A Texas appeals court considered an appeal by parents that their school district be prevented from implementing a change in school attendance zones. The change was designed to address changing ethnic compositions in two high schools. It applied only to students scheduled to enter the schools, allowing others to finish their high school programs in the school where they originally enrolled. It also contained a provision exempting siblings from having to attend a different school. The appellants argued that the board had violated the state education code and that the board had no power to address de facto segregation caused by changing residential patterns.

The appeals court found for the defending district, holding that the absence of a court order did not prevent the district from seeking further integration.[133] The state appeals court found the district had ample authority for its action, citing *Swann v. Charlotte-Mecklenburg Board of Education*.[134] The court also held that the plan was not a "transfer" of students to another school, that can be made under the state code only on a case-by-case basis. Instead, the issue was a boundary rezoning that fell within the broad powers of district boards to effect.

An Illinois school board argued that the state had no power to withhold funds for a local gifted program, following a unilateral finding by the state that the program was operated in a discriminatory manner. The district argued that the state had no power to insist that the local program designate spaces in the program for minority students. The state, in turn, argued that the program was intentionally segregated by race and that the doctrine of sovereign immunity precluded the local suit. An appeals court rejected the state's claims and found for the local district.[135] At the heart of the court's decision, it was held that the state's action had not afforded the district any opportunity to contest the finding of racial segregation in the program's operation. The proper course of action for the state, the court concluded, was to file a complaint with the state attorney general. Otherwise, the state board was assuming the role of "prosecutor, judge, and enforcer of its own sanctions."

Attorneys' Fees

Attorneys' fees cases in desegregation litigation often become as complicated as the original cases themselves, with questions raised as to

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133. Citizens for Better Educ. v. Goose Creek Consolidated Indep. School Dist., 719 S.W.2d 350 (Tex. Ct. App. 1986).

134. 402 U.S. 1 (1971).

135. Board of Educ., Peoria v. Sanders, 502 N.E.2d 730 (Ill. Ct. App. 1986).

who was the "prevailing party" and what charges might be proper. Courts frequently are guided by the twelve factors found in a Fifth Circuit case when seeking to determine appropriate fees.[136] *Hensley v. Eckerhart*[137] also admonishes courts to guard against overcharging and double billing. These matters were considered in two 1986 fee cases heard by the Eighth Circuit Court of Appeals.

The state of Arkansas challenged a district court decision that it was liable for both attorneys' fees and desegregation costs in Conway County. The court had reinstated the state as a defendant in the case in 1980, seven years after it was originally dismissed. The Eighth Circuit found that, although it was uncertain what evidence the state might present to "insulate itself from liability," the district court nevertheless had an obligation to hold a hearing to afford the state an opportunity to contest its liability.[138] As to the fees, the Eighth Circuit ruled that they could be assigned by the court for the expenses associated with the state's challenge as to its liability, but they could not be awarded to the local school districts for the seven years when the state was not a party in the case.

Intervenors in the Little Rock desegregation case sought both fees and a 50% "enhancement," because of the contingent nature of the representation they afforded. The Eighth Circuit, en banc, awarded the fees, distributed among the state and three districts that were participants in the case, finding no special circumstances under which the enhancement was warranted.[139] In dissent, three judges would have adjusted the percentages of the fees charged to the districts in a different way.

Litigation continued in the award of fees first made in 1984 in the desegregation litigation in Prince George's County, Maryland.[140] In this latest round of litigation, the district court was asked to approve the payment of the $373,000 in fees over a two-year period, to take into account the fiscal difficulties experienced by the school district.[141] The court approved this plan and set specific payment dates that compromised the schedules proposed by the opposing parties. The court also set a starting date for the accrual of interest charges on the award.

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136. Johnson v. Georgia Highway Express, Inc., 488 F.2d 714 (5th Cir. 1974).

137. 461 U.S. 424 (1983).

138. United States v. Arkansas, 791 F.2d 1573 (8th Cir. 1986).

139. Little Rock School Dist. v. Pulaski County Special School Dist., 787 F.2d 372 (8th Cir. 1986).

140. Vaughns v. Board of Educ. of Prince George's County, 598 F. Supp. 1262 (D. Md. 1984). *See* The Yearbook of School Law 1985 at 130-31. *See also*, Vaughns v. Board of Educ. of Prince George's County, 770 F.2d 1244 (4th Cir. 1985) (fee enhancement award was an abuse of discretion by the district court).

141. Vaughns v. Board of Educ. of Prince George's County, 627 F. Supp. 837 (D. Md. 1985).

Further fees, for activity since the court's 1984 decision, also were addressed by the court. After some discussion, the court adjusted the requested fees and indicated that future disputes regarding fees in the case would be resolved by a court-appointed master, if the parties could not agree to a division. Cost of the master would be taken from the parties in a percentage proportionate to their final award.